

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

United Communications Systems, Inc.)	
d/b/a Call One)	
)	
Petition for Arbitration of an)	Docket No. 03-0772
Interconnection Agreement with)	
Illinois Bell Telephone Company d/b/a)	
SBC Illinois, Pursuant to Section 252(b))	
of the Telecommunications Act of 1996)	

SBC ILLINOIS' RESPONSE TO UCS'S MOTION TO STRIKE

Illinois Bell Telephone Company d/b/a SBC Illinois ("SBC Illinois"), by its attorneys, hereby files its Response to United Communications Systems, Inc.'s ("UCS") Motion to Strike SBC Illinois' testimony. As further explained below, UCS's Motion should be denied because: (1) UCS's reliance on Section 761.110(e) of the Commission's rules and the Commission's verification requirements is misplaced and does not in any event justify striking SBC Illinois' Response or supporting testimony; (2) UCS's contention that SBC Illinois is precluded from presenting responsive testimony concerning the subject matter of discovery requests to which SBC Illinois was entitled to object has no merit; (3) UCS's assertion that SBC Illinois failed to negotiate in good faith is incorrect, because UCS was provided with the language proposed by SBC Illinois' arbitration issues during the pre-Petition negotiations; and (4) SBC Illinois' testimony does not constitute improper and inadmissible evidence concerning settlement negotiations.

I. UCS'S ARGUMENT THAT SBC ILLINOIS' RESPONSE AND TESTIMONY SHOULD BE STRICKEN IN THEIR ENTIRETY SHOULD BE REJECTED.

UCS contends that the Commission should strike SBC Illinois' Response and testimony *in their entirety* because: (1) SBC Illinois purportedly did not set forth its positions with respect

to UCS's arbitration issues in the Response; and (2) they are not verified. UCS is wrong on both counts.

First, UCS's contention that SBC Illinois' testimony should be stricken in its entirety because it purportedly "does not 'constitut[e] respondent's support for its response'" misapplies Section 761.110(e) of the Commission's rules. Under UCS's interpretation of that rule, a respondent in a Section 252 arbitration would be precluded from presenting evidence where the respondent chose to exercise its right under Section 252(b)(3) of the Telecommunications Act of 1996 ("1996 Act") *not* to respond to a petition for arbitration.¹ UCS does not, and cannot, point to any authority that supports its erroneous interpretation of the Commission's rule.

Moreover, even if UCS were correct in contending that the only SBC Illinois testimony that is admissible is testimony that supports SBC Illinois' response to the Petition, UCS's argument would still fail, because SBC Illinois did, contrary to UCS's claim, address UCS's arbitration issues in the Response. Indeed, UCS's claim wholly ignores the fact that SBC Illinois undertook the burdensome task of creating a new relined contract document in order to provide the Commission with a document that accurately reflects SBC Illinois' positions regarding each and every one of UCS's arbitration issues. *See* SBC Illinois Response, at 1-2, and Attachment A. And needless to say, the issues in any arbitration proceeding are at bottom defined by the parties' competing contract language. SBC Illinois' testimony supports its proposed contract language set forth in Attachment A to the Response, and thus, UCS's claim that SBC Illinois' testimony does not constitute support for the Response has no merit. Finally, SBC Illinois' Response requests that the Commission resolve the arbitration issues in SBC Illinois' favor based not only

¹ Section 252(b)(3) unequivocally states: "A non-petitioning party to a negotiation under this section *may* respond to the other party's petition . . ."

on the reasons set forth in the Response but also “for the reasons to be set forth in SBC Illinois’ subsequent submissions.” SBC Illinois Response, at 13. That statement alone – under UCS’s bizarre interpretation of the Commission’s rule – sufficiently establishes SBC Illinois’ testimony as support for the Response.

Second, UCS’s claim that SBC Illinois’ testimony should be stricken because it has not been verified is baseless. Testimony in Section 252 arbitration proceedings is routinely submitted without an accompanying verification because that testimony is ultimately entered into evidence at the evidentiary hearing under the *sworn oath* of a witness. *See e.g.* SBC Illinois testimony in Docket Nos. 03-0239, 01-0623, and 01-0338. SBC Illinois’ testimony in this proceeding will also be entered into evidence under the sworn oath of its witnesses, and thus, there is no legitimate justification for striking SBC Illinois’ testimony.²

II. UCS’S ASSERTION THAT THE COMMISSION SHOULD STRIKE SBC ILLINOIS’ TESTIMONY ON MATTERS TO WHICH IT OBJECTED DURING DISCOVERY IS BASELESS.

UCS contends that the Commission should strike portions of SBC Illinois’ testimony concerning matters to which SBC Illinois objected in responding to UCS’s discovery requests. UCS Motion, at 8-9. Unless UCS is willing to stipulate that SBC Illinois will be the final arbiter of all questions of relevance in this proceeding, UCS’s argument must be denied. Otherwise, SBC Illinois was entitled to object to UCS’s discovery requests that it considered improper, and SBC Illinois’ relevance objections will either be sustained or overruled by the ALJ. If the ALJ

² It should also be noted that the Direct Testimony of Torsten Clausen filed on behalf of Staff on March 1, 2004 also was not verified (consistent with the practice of Staff and other parties in other Commission proceedings), although Staff did file a verification of that testimony with the Commission on March 5, 2004, in the wake of UCS’s Motion to Strike. Therefore, to the extent the Commission finds that a verification of SBC Illinois’ testimony is required, it should also permit SBC Illinois to resubmit verified statements, just as Staff did by its March 5, 2004 filing. Similarly, to the extent the Commission finds that a verification is necessary for SBC Illinois’ Response, SBC Illinois respectfully requests the opportunity to submit a verification.

sustains SBC Illinois' relevance objections, then UCS can move to strike SBC Illinois' evidence that concerns the same matters on the ground that it, too, is irrelevant, and presumably, UCS will be able to argue effectively that the ALJ should find the SBC Illinois evidence irrelevant if he found the UCS evidence on the same subject irrelevant. But there is no principle of law (or of common sense) that says that a party that makes a relevance objection is precluded from offering evidence on the subject the party claimed was irrelevant, and UCS's suggestion to the contrary is frivolous.³

III. SBC ILLINOIS' ARBITRATION ISSUES CANNOT LAWFULLY BE STRICKEN, BECAUSE SBC ILLINOIS' PROPOSED LANGUAGE WAS PRESENTED TO UCS DURING NEGOTIATIONS.

UCS contends that the Commission should strike the 15 arbitration issues raised in SBC Illinois' Response, on the grounds that SBC Illinois' positions on those issues were not presented to UCS during the statutory negotiations period. UCS's contention should be rejected for two reasons.

First, SBC Illinois' Issue No. 1 concerns language in Section 2 of UCS's proposed Appendix Resale, which purportedly reflects the terms and conditions upon which SBC Illinois will provide UCS with CompleteLink Service for resale, and which UCS incorrectly represents as language agreed upon by the parties. *See* UCS Petition, Exhibit C2. As explained in SBC Illinois' Response (at 3-4) and the supporting testimony of Roman Smith (lines 2003-2053), SBC Illinois does not agree to any of the language set forth in Section 2 of UCS's proposed Appendix Resale, and thus, SBC Illinois was required to raise an issue in its Response as to whether such language should be included in the interconnection agreement with UCS. Moreover, as

³ UCS also complains that SBC Illinois' testimony improperly addresses "the results of three hand-picked studies from other states," that SBC Illinois withheld from UCS in discovery. UCS Motion, at 9. In actuality, SBC Illinois' testimony discusses the *findings* contained in three *state commission orders* – orders of which this Commission can take administrative notice, and of which SBC Illinois can address in its legal briefs, regardless of whether they are discussed in testimony.

explained in the attached Affidavit of Ronald Hill (at ¶ 8), to the extent that SBC Illinois agreed to provide UCS with CompleteLink Service for resale on the terms and conditions set forth in Section 2 of UCS's proposed Appendix Resale, SBC Illinois made clear to UCS during the pre-Petition negotiations that SBC Illinois' offer was made in anticipation of negotiation of a complete interconnection agreement through Section 252(a)(1) of the 1996 Act rather than through arbitration. Accordingly, there is no merit to UCS's claim that SBC Illinois Issue No. 1 and the supporting testimony on that issue should be stricken because SBC Illinois' position was not disclosed to UCS during the pre-Petition negotiations.

Second, the proposed language for SBC Illinois' arbitration issues 2 through 15 comes from SBC's generic resale agreement and appendices, which were provided to UCS during the pre-Petition negotiations and which represented SBC Illinois' baseline negotiating position during negotiations. Hill Affidavit, ¶ 3. UCS did not object to this language during negotiations, and even acknowledged that certain portions of it belong in the interconnection agreement. *Id.* ¶ 5. Nevertheless, UCS failed to reflect SBC Illinois' proposed language either as disputed or undisputed in the redline contract document filed with its Petition. *Id.* ¶ 6.⁴ Therefore, SBC Illinois was required to file its own redlined contract document, and raise its own arbitration issues in order to apprise the Commission of SBC Illinois' proposed language from the generic resale agreement and appendices that is not affected by any of UCS's arbitration issues. *Id.* For these reasons, the Commission should reject UCS's contention that SBC Illinois somehow breached its duty to negotiate in good faith by failing to provide UCS with SBC Illinois'

⁴ As noted in SBC Illinois' Response to UCS's Petition, UCS's redlined contract document did not reflect SBC Illinois' proposed contract language on the vast majority of arbitration issues raised by UCS itself. *See* SBC Illinois Response, at 1.

proposed language and positions during the pre-Petition negotiations, and should deny UCS's motion to strike SBC Illinois' 15 arbitration issues and supporting testimony.

IV. SBC ILLINOIS' TESTIMONY CITED BY UCS DOES NOT CONSTITUTE IMPROPER EVIDENCE CONCERNING SETTLEMENT NEGOTIATIONS.

UCS contends that if the Commission strikes UCS's improper and inadmissible testimony concerning settlement negotiations, it should also strike SBC Illinois' improper and inadmissible testimony concerning settlement negotiations. UCS Motion, at 14-15. To the extent SBC Illinois' testimony does in fact contain improper and inadmissible evidence concerning settlement negotiations, SBC Illinois wholeheartedly agrees with UCS's position.

But it is UCS's burden to identify for the Commission each portion of SBC Illinois' testimony that allegedly constitutes improper and inadmissible testimony that should be stricken. UCS does not do this. Instead, UCS provides only an "illustrative and not all inclusive" list of examples of SBC Illinois' testimony that should, in UCS's view, be excluded. UCS Motion, at 15, note 25. Moreover, a review of UCS's "illustrative and not all inclusive" list demonstrates that virtually none of the testimony cited by UCS constitutes improper or inadmissible evidence concerning settlement negotiations. Rather, that testimony contains nothing more than statements regarding the parties' respective positions, which Staff itself has noted is different than "non-admissible testimony regarding settlement discussions."⁵ Accordingly, the Commission should deny UCS's Motion to Strike SBC Illinois' testimony on the ground that it constitutes improper and inadmissible evidence of settlement negotiations.

V. CONCLUSION

Based on the foregoing, SBC Illinois respectfully requests that the Commission deny UCS's Motion to Strike.

⁵ See Staff's Response to SBC Illinois' Motion to Strike and Disqualify, p. 11 (Feb. 2, 2004).

Date: March 15, 2004

Respectfully submitted,

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